MALAYAWATA STEEL BHD. v. UNION OF MALAYAWATA STEEL WORKERS

[O.C.J. (Gunn Chit Tuan J.) March 25, 1977]
[Penang — Originating Motion No. 22 of 1976]

Administrative Law — Certiorari — Rules of natural justice — Error of law.

The applicant sought by writ of certiorari to remove into the court for the purpose of it being quashed Industrial Court Award No. 57/76 made on July 22, 1976. The grounds on which the leave was sought were as follows:—

(1) for breach of the rules of natural justice in that the applicant was not given a fair opportunity of being heard by presenting its case and calling witnesses;

(2) for excess of jurisdiction in that the Industrial Court had exceeded its jurisdiction by making an award on the quantum of Special Relief Allowance when this was not one of the issues before the court; and

(3) for an error of law on the face of the record in that under section 30(7) of the Industrial Relations Act, 1967 (Revised 1976), the Industrial Court can only make an award retrospective to a date not more than six months from the date the dispute was referred to the court.

Held: (1) in this case, there had been a denial of natural justice in that the applicant was not allowed to call witnesses and was therefore not given a reasonable opportunity of presenting its case. Since there had been a denial of natural justice, the High Court was in a position to interfere and to make an order of certiorari;

(2) there was an error of law on the face of the record justifying the High Court in making an order of certiorari on that ground alone.

Case referred to:-

(1) *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, 118.

ORIGINATING MOTION.

T.R. Hepworth for the applicant.

John R. Gurusamy for the respondent.

Gunn Chit Tuan J.: The applicant, Malayawata Steel Berhad, sought by writ of *certiorari* to remove into this court for the purpose of it being quashed Industrial Court Award No. 57/76 made on July 22, 1976 in Industrial Court Case No. 71/76.

The grounds on which the leave was sought were as follows:—

(1) for breach of the rules of natural justice in that the applicant was not given a fair opportunity of being heard by presenting its case and calling witnesses;

(2) for excess of jurisdiction in that the Industrial Court had exceeded its jurisdiction by making an award on the quantum of Special Relief Allowance when this was not one of the issues before the court; and

(3) for an error of law on the face of the Record in that under section 30(7) of the Industrial Relations Act, 1967 (Revised-1976), the Industrial Court can only make an award retrospective to a date not more than six months from the date the dispute was referred to the court.

The events leading up to the present proceedings were as follows:—

In 1973 the applicant and the respondent, the Union of Malayawata Steel Workers, commenced negotiations on improved wages and conditions of service. The negotiations were fraught with difficulties and for a long time no agreement was reached. It was then decided by both parties that, as an interim measure, an Interim Agreement dated November 28, 1973 be entered into between the parties whereby the applicant agreed to give an immediate base-up in salary to the respondent's members, in return for which the respondent was to stop industrial action (then in progress) and to give up any claim for cost of living allowance (C.O.L.A.) at the forthcoming negotiations, which were to be held subsequently, to finalise all other claims.

Subsequently, the applicant and the respondent recommenced negotiations which eventually resulted in the conclusion of the Collective Agreement signed on August 23, 1974.

On April 19, 1975, eight months later, the respondent wrote to the applicant submitting a claim for C.O.L.A. or SRA. The applicant replied to the respondent on April 24, 1975, stating that it was the applicant's contention that the respondent had agreed to make no separate claim for C.O.L.A. as it had been included in the base-up in salary given in the said Interim Agreement. The respondent was not satisfied with the applicant's reply and eventually both sides agreed to refer the matter to the Industrial Court on a Joint Application dated the 24th September, 1975 as an interpretation dispute over the clause concerned in the Interim Agreement. The said Joint Application was heard by the Industrial Court on January 5, 1976, and the Industrial Court ruled that as the said Interim Agreement had not been deposited with it and was therefore not officially taken cognizance of, it was unable to treat that Application as an interpretation issue. The said court then suggested that both parties could proceed, if they so desired, under section 26 of the Industrial Relations Act, 1967 (Revised-1976), that is to agree to treat the question of C.O.L.A. as a trade dispute and to refer it to the Ministry of Labour for conciliation. If conciliation proved unsuccessful, the matter could be referred by the Minister of Labour to the Industrial Court. Subsequently both parties agreed that the matter should be referred to the Industrial Court which ordered on July 22, 1976 as follows:—

(1) the payment of Supplementary Relief Allowance by the applicant to members of the respondent;

(2) payment of Supplementary Relief Allowance at the following rates:—

(a) $45/- to those drawing below $200/-;

(b) $35/- to those drawing from $201/- to $300/-;

(c) $25/- to those drawing from $301/- to $500/-.

(3) the payment of such amounts to be made with effect from May 1, 1975.

With regard to the first ground on which relief was sought, namely, breach of the rules of natural justice, it was pointed out by Mr. Hepworth, counsel for the applicant, that the applicant wished to call witnesses to adduce evidence at the hearing before the Industrial Court. The applicant's General Manager, Mr. Khoo Seang Hoe, was present and the applicant

wanted to call him to give evidence of the Agreement reached as to SRA under the said Interim Agreement. He was however only called to confirm that he had signed the Inetrim Agreement and was not permitted to say more. The applicant also wished to call an important witness, one Mr. Cheah, an Industrial Relations officer, who had witnessed the signing of the Interim Agreement. The applicant's representative had written to the Registrar of the Industrial Court requiring a subpoena to be issued for the attendance of that Mr. Cheah. It is true that the relevant statutory form for request to issue a subpoena was not sent to the said Registrar, who had therefore not issued any subpoena, but the applicant was not permitted to call Mr. Cheah at the hearing to give evidence. Even the respondent too had wished to call a witness to adduce evidence but was prevented from so doing. Both parties were therefore denied the opportunity of cross-examining the other party's witnesses. Moreover the Industrial Court insisted on treating the matter as one of interpretation of the said Interim Agreement although it had itself on another occasion held that it could not do so as the said Interim Agreement had not been taken cognizance of by it under section 16 of the Industrial Relations Act, 1967 (Revised-1976).

In reaching a decision in relation to a trade dispute referred to an Industrial Court under section 30 of the Industrial Relations Act, 1967 (Revised-1976), the hearing before it should be in accordance with the rules of natural justice. Thus in his judgment in *Russell* v. *Duke of Norfolk*,[1] at page 118, Lord Justice Tucker has said as follows:—

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.'

In this case, I took the view that there had been a denial of natural justice in that the applicant was not allowed to call witnesses and was therefore not given a reasonable opportunity of presenting its case. Since there had been a denial of natural justice, the High Court was in a position to interfere and to make an order of *certiorari*.

Although an order of *certiorari* could be granted on the first ground above, the applicant's other grounds on which relief was sought were also considered. On the question of excess or want of jurisdiction, it was contended by the applicant that the Industrial Court had acted in excess of jurisdiction in that the quantum of Special Relief Allowance was not in issue. But it was pointed out by the respondent that under section 30(6) of the Industrial Relations Act, 1967 (Revised-1976), the Industrial Court in making its Award was not restricted to the specific relief claimed by the parties but may include in the Award any matter or thing which it thinks necessary or expedient for the purpose of settling to trade dispute. In my opinion, the Industrial Court was entitled to deal with the quantum of SRA, though here again it should have heard the applicant first before making an Award of the amount requested by the respondent without giving any reason for so doing. There was therefore in this instance no excess or want of jurisdiction though there was, in my opinion, another breach of the rules of natural justice.

As regards the third ground, it was contended by the applicant that there was an error of law on the face of the Record in that under sub-section (7) of section 30 of the said Act, the Industrial Court could only make an award retrospective to six months from the date the dispute was referred to it. Sub-section (7) of section 30 of the said Act reads as follows:—

"An award may specify the period during which it shall continue in force, and may be retrospective to such date as is specified in the award:

Provided that the retrospective date of the award may not, except in the case of a decision of the court under section 33 or an order of the court under section 56(2)(c) or a decision of the court on a reference to it under section 20(3), be earlier than six months from the date on which the dispute was referred to the court."

In this case, the Minister of Labour referred the dispute to the Industrial Court on April 22, 1976 so that the Award could not be backdated before October 23, 1975. The Industrial Court purported to backdate the Award to May 1, 1975.

Mr. Gurusamy, counsel for the respondent, submitted that the proceedings before the Industrial Court were in effect for the interpretation of the said Collective Agreement of August 23, 1974 under section 33 of the said Act. Section 33 of the said Act is as follows:—

"33. (1) If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the court for a decision on the question.

(2) The court may, upon the application of any party, by order vary any of the terms of an award, if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.

(3) The parties bound by the award or agreement shall be afforded a reasonable opportunity of being heard.

(4) The decision of the court shall be binding in the same manner as the original award or agreement.

(5) The expression 'court' for the purpose of this section, means the court by which the award was made or any other court specially constituted under section 22 for the purpose."

According to counsel's contention, the said Interim Agreement was incorporated in the said Collective Agreement. As the Collective Agreement had been taken cognizance of by the Industrial Court, it could therefore make an award under the said proviso to sub-section (7) of section 30 of the said Act, retrospective to a date more than six months from the date on which the dispute was referred to the Industrial Court. With respect, I could not agree with the submissions of counsel for the respondent. The Industrial Court had already ruled that because the said Interim Agreement was not deposited with it at the time of signing, that Interim Agreement had not been taken cognizance of and the said court could not therefore deal with the previous application as a matter of interpretation under section 33 of the said Act. The said Interim Agreement did not form part of the said Collective Agreement and accordingly, even though the

Collective Agreement had been taken cognizance of by the Industrial Court, the said court, which had not taken cognizance of the Interim Agreement, could not deal with any reference concerning the Interim Agreement as an interpretation issue under section 33 of the said Act. In any case, it was clear that this was a reference of a trade dispute to the Industrial Court under section 26 and was not a reference of a question of interpretation under section 33 of the said Act. The powers of an Industrial Court of making awards are provided for in section 30 of the said Act and under the said sub-section (7) of section 30 of the Act, a retrospective date of any award made may not be earlier than six months from the date on which the dispute was referred to the Industrial Court. As will be seen in the said proviso to the said sub-section (7) of section 30, the exceptions provided for relate to cases of a decision of the said court under section 33 or an order of the said court under section 56(2)(c) or a decision of the said court on a reference to it under section 20(3). The present case was not one of those exceptions provided for. There was therefore an error of law on the face of the Record justifying the High Court in making an order of *certiorari* on that ground alone.

As the proceedings before the Industrial Court on July 22, 1976 were wholly unsatisfactory, and for the reasons above, I therefore allowed the application and ordered that Award No. 57/76 of the Industrial Court be removed to the High Court and be quashed accordingly. I also ordered that the costs of and incidental to the application be paid by the respondent.

Application allowed.

Solicitors: *Allen & Gledhill; John R. Gurusamy & Gengadharan.*

K.P. KUNCHI RAMAN v. GOH BROTHERS SDN. BHD.

[O.C.J. (Gunn Chit Tuan J.) March 29, 1977]
[Penang — Civil Suit No. 234 of 1972]

Contract — Entire contract — Doctrine of substantial performance — Rights of parties.

The plaintiff, a contractor, originally claimed that a sum of $16,580.18 which was reduced to $11,656.81, was due to him being the balance payable for work performed under an agreement dated November 17, 1970. By that agreement the plaintiff agreed to execute certain works, namely, to lay water pipes complete with specials and valves between Mak Mandin and Prai and between Mak Mandin and Jalan Raja Uda in Butterworth. Under the agreement, the defendant undertook to supply the pipes, etc. at the site of work, whereas the plaintiff was to supply all labour and other equipment for laying the pipes. The contract also included work for the reinstatement of a cycle tract of a size and length and at rates detailed in the said agreement. The plaintiff claimed that he had performed the work of reinstatement of the cycle track by July 15, 1971 and the other works by September 15, 1971. The defendant, a company, denied that the plaintiff had completed the works in question as claimed by him, and averred that it was a term of the contract that the plaintiff would execute the works to the satisfaction of the defendant and the Chief Resident Engineer of the River Muda Water Scheme, who was in charge of the contract works, but in spite of repeated requests by the defendant to comply with the instructions, the plaintiff failed to complete the works as agreed. The defendant incurred expenses in completing the contract and counterclaimed for repayment of sums paid to the plaintiff or for damages.

Held: as the plaintiff had substantially completed the contract he was entitled to claim for any balance due to him for work done. The defendant was also entitled to cross-claim for the defects and omissions, and as the cost of completing the contract work and repairing work unsatisfactorily done overtopped the balance claimed by the plaintiff, the plaintiff's claim should be dismissed and judgment given for damages on the counterclaim.

Cases referred to:-

(1) *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176, 181.
(2) *Sumpter* v. *Hedges* [1898] 1 Q.B. 673.
(3) *Appleby* v. *Myers* (1867) L.R. 2 C.P. 651.
(4) *Whitaker* v. *Dunn* (1887) 3 T.L.R. 602.
(5) *Bolton* v. *Mahadeva* [1972] 2 All E.R. 1322.
(6) *Kiely & Sons Ltd.* v. *Medcraft* (1965) 109 Sol. Jo. 829 C.A.
(7) *Hanak* v. *Green* [1958] 2 Q.B. 9.

CIVIL SUIT.

S. Thillaimuthu for the plaintiff.

S. Jeya Palan for the defendants.

Gunn Chit Tuan J.: The plaintiff, K.P. Kunchi Raman, who was a contractor, originally claimed that a sum of $16,580.18, which was later reduced to $11,656.81, was due to him being the balance payable for work performed under an agreement dated the 17th day of November, 1970. By that agreement, the plaintiff agreed to execute certain works, namely, to lay water pipes complete with specials and valves between Mak Mandin and Prai and between Mak Mandin and Jalan Raja Uda in Butterworth. Under the agreement, the defendant undertook to supply the pipes, etc. at the site of work, whereas the plaintiff was to supply all labour and other equipment for laying the pipes. The contract also included work for the reinstatement of a cycle track of a size and length and at rates detailed in the said agreement.

The plaintiff claimed that he had performed the work of reinstatement of the cycle track by July 15, 1971 and the other works by September 15, 1971. The defendant, a company, denied that the plaintiff had completed the works in question as claimed by him, and averred that it was a term of the contract that the plaintiff would execute the works to the satisfaction of the defendant and the Chief Resident Engineer of the River Muda Water Scheme, who was in charge of the contract works, but in spite of repeated requests by the defendant to comply with the instructions, the plaintiff failed to complete the works as agreed.

Because of the plaintiff's failure and refusal to complete the contract work and to carry out repairs in respect of work already completed, the defendant had to engage other sub-contractors to replace the plaintiff after giving him due notice. The defendant had to pay the other sub-contractors appointed in place of the plaintiff a total sum of $22,451.44 to complete the contract work and to carry out the necessary repairs on works which had been unsatisfactorily completed. It claimed that it had suffered a loss of $6,047.54 and therefore counter-claimed for the repayment of a sum of $55,024.23 already paid to the plaintiff or alternatively, damages in the sum of $6,047.54, and costs.

Although the plaintiff commenced work about a week before the date of the said agreement and he agreed to "complete the whole work within four